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No. 99-____

IN THE

# Supreme Court of the United States

RESTAURANT ROW, ASSOCIATES AND THE AFTERDECK, INC. D/B/A/*THEE DOLLHOUSE*, PETITIONERS

V.

HORRY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF SOUTH CAROLINA, RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should a particular land use be regulated based on the "adverse secondary effects" reputed to be associated with that type of land use as a whole, when it is conclusively established that the particular land use at issue does not create the "adverse secondary effects" associated with the land use type?

2. Can an adult use zoning regulation be applied retroactively without the payment of just compensation?

## PARTIES TO THE PROCEEDING

Restaurant Row, Associates is a South Carolina General Partnership. The Afterdeck, Inc. is a South Carolina Corporation, which is closely held and has never issued shares to the public, which is a wholly owned subsidiary of Myrtle Beach Food and Beverage Incorporated, which is closely held and has never issued shares to the public. Horry County is a political subdivision of the State of South Carolina.

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## PETITION FOR WRIT OF CERTIORARI

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The Afterdeck, Inc., respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of South Carolina entered in this proceeding on May 17, 1999 (Appendix, p. A-1 – A-14) and for which rehearing was denied on June 23, 1999. (Appendix, p. A-27 – A-28)

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## OPINIONS BELOW

The Opinion of the Supreme Court of South Carolina is reported at 516 S.E.2d 442 (S.C. 1999) (Appendix, p. A-1). The Opinion of the South Carolina Court of Appeals is reported at 489 S.E.2d 641, 645 (S.C. App. 1997) (Appendix, p. A-15). The Opinion of the trial court and the underlying opinion of the Horry County Board of Adjustments and Zoning Appeals (hereinafter "Board"), are unreported, but are reproduced in the Appendix beginning at pages A-29 and A-33, respectively.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1257(1). The Supreme Court of South Carolina entered its Opinion on May 17, 1999, and denied a motion for rehearing on June 23, 1999. Pursuant to Article V, § 5 of the Constitution of the State of South Carolina, the decision of the Supreme Court of South Carolina is the decision of the highest court of the State with jurisdiction over this matter.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitution of the United States, Amendment 1**

The First Amendment to the Constitution of the United States provides in pertinent part: " Congress shall make no law ... abridging the freedom of speech ..."

**Constitution of the United States, Amendment 5**

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "... nor shall any person be ... deprived of life, liberty or property without due process of law, nor shall private property be taken without just compensation."

**Constitution of the United States, Amendment 14**

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "... nor shall any State deprive any person of life, liberty or property without due process of law, ..."

**42 U.S.C. § 1983**

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of state law ... subjects, or causes to be subjected, any citizen to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."

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## STATEMENT OF THE CASE

Petitioners Restaurant Row Associates and the Afterdeck, Inc., (hereinafter *Thee DollHouse*), own the real property occupied by, and operate an adult cabaret known as *Thee DollHouse*. *Thee DollHouse* offers to the public dance performances of an adult nature; a form of expression protected by the First Amendment to the Constitution of the United States, and by the Constitution of the State of South Carolina. The dances performed are exotic, expressive and communicative, performed by females, conveying a message of sensuality and physical appeal inherent in the presentation of the natural female body. The dances are performed to music which, itself, has an expressive content. *Thee DollHouse*'s business is an "upscale" business, catering primarily to a white collar clientele.

At the time *Thee DollHouse* opened for business, Horry County's zoning regulations did not include any content-based definitions setting apart an "adult cabaret" from a cabaret which did not offer topless or nude expression. Subsequently, Horry County purported to adopt several amendments to its zoning regulations, which amendments incorporated content-based definitions of various land uses, including adult cabarets. The definition of an adult cabaret established in the Horry County zoning regulations is found in the Appendix at page A-38.

The cumulative effect of the various Horry County Adult Use Ordinances was to make the location of *Thee DollHouse* allegedly illegal, and to require *Thee DollHouse* to stop offering its First Amendment protected speech on or before September 30, 1995. In particular, as noted by the South Carolina Court of Appeals, *Thee DollHouse* allegedly became "illegal" only because it was within 500 feet of a residential zoning district – which district was located **across** the Atlantic Intracoastal Waterway, and was occupied **only** by a golf course, with no residential uses whatsoever existing or contemplated for the golf course. (Appendix, p. A-17).

Although under no legal obligation to do so, *Thee Doll-House* elected to defer a facial challenge to the Horry County adult use zoning regulations in the United States District Court, and, instead, sought administrative relief from the Horry County Board. [1]

In the course of the hearings before the Horry County Board, there was not one iota, one scintilla, of evidence that *Thee DollHouse* had caused any adverse secondary effects in any way, to any area. There was no suggestion that *Thee DollHouse* had lowered property values in its area; there was no suggestion that *Thee DollHouse* had caused any crime, let alone an increase in crime, in its area; and there was no evidence that *Thee DollHouse* had caused blight in its area.

Opposition to *Thee DollHouse*'s application for a variance was voiced by persons ideologically opposed to adult

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[1] At the same time, *Thee DollHouse* also appealed two determinations by the Horry County Zoning Administrator with respect to whether *Thee DollHouse* was, in fact, an adult cabaret as defined (Appendix, p. A-38), and whether an intervening Ordinance had the effect of repealing the amortization schedule applicable to *Thee DollHouse*. These issues are not addressed in this Petition for Writ of Certiorari.

entertainment who interposed their personal objections to the erotic speech at issue. These opponents did not refute the competent, substantial evidence of *Thee DollHouse*'s expert as to the absence of "adverse secondary effects" caused by the business. In fact, in addition to the expert's testimony, the Board had before it a report of approximately 150 pages that conclusively demonstrated that *Thee DollHouse* did not cause adverse secondary effects.

This report and testimony were absolutely unrebutted. Even the Supreme Court of South Carolina acknowledged this fact:

> "Thee DollHouse's position is that the Board cannot deny a variance if there was no proof introduced to the Board that Thee DollHouse created any negative effects. We disagree.
>
> "...
>
> "... Adult businesses cannot exclude themselves from legitimate zoning regulation by providing expert testimony that they do not currently produce negative secondary effects. . .." (Appendix at p. A-11.)

Further evidence of the lack of adverse secondary effects generated by *Thee DollHouse* is that, in 20 separate "Findings of Fact," the Horry County Board made not one finding of secondary effects generated by *Thee DollHouse*. (Appendix, p. A-33).

Subsequent to the denial of rehearing, by the Supreme Court of South Carolina, Horry County sought an injunction against the continued presentation of Constitutionally protected speech at *Thee DollHouse* which injunction was granted. The

injunction was granted in spite of consistent findings by every level of the South Carolina judiciary that the so-called "adverse secondary effects" which provide the **only** basis for the use of content-based zoning restrictions for adult entertainment businesses, absolutely did not exist at *Thee DollHouse*.

The issue of great public importance embodied in this action is whether or not a government can impose a completely arbitrary prior restraint on speech, with no factual justification as to the specific speech being restrained.

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## PROCEEDINGS BELOW

After the Horry County Board denied *Thee DollHouse*'s variance application, *Thee DollHouse* filed a Petition for Writ of Certiorari in the Court of Common Pleas. After oral argument, the case was taken under advisement and the Petition for Writ of Certiorari was ultimately granted (Appendix, p. A-29). In particular, the Court ruled:

> "Additionally, Thee DollHouse does not appear to adversely effect the surrounding neighborhood and its quality of life. Thee DollHouse is not causing blight, increase in crime or decrease in property values. Actually neighboring property values have increased. Neither the businesses nor the citizens in the area have registered complaints." (Appendix, p. A-31)

Horry County appealed the decision of the Court of Common Pleas to the South Carolina Court of Appeals. That Court overturned the decision of the Court of Common Pleas (489 S.E.2d 641, Appendix, p. A-15, *et.seq.*).

A Petition for Writ of Certiorari seeking review of the Court of Appeals' decision was filed. The Supreme Court of South Carolina granted certiorari, and modified but affirmed the decision of the Court of Appeals, (516 S.E.2d 442, 1999 Appendix, p. A-1). A Motion for Rehearing was filed and subsequently denied. (Appendix, p. A-27). This Petition for Writ of Certiorari ensued.

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## REASONS WHY CERTIORARI SHOULD BE GRANTED

### I. THE ABSENCE OF ACTUAL SECONDARY EFFECTS REMOVES ANY JUSTIFICATION FOR THE IMPOSITION OF CONTENT-BASED ZONING

It is undisputed in the record below, and, in fact, specifically acknowledged by the Courts below, that *Thee DollHouse* does not cause the "adverse secondary effects" allegedly associated with sexually oriented Adult Uses such as adult cabarets. [2] The Supreme Court of South Carolina basically said that it was immaterial that *Thee DollHouse* does not cause adverse secondary effects, because adult cabarets, as

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[2] In the instant case, Petitioner challenged the validity of the "studies" purporting to show that sexually oriented Adult Uses cause "adverse secondary effects" different than those of generic commercial uses – in other words, that the harms allegedly associated with these uses are real, and that adult use zoning or licensing regulations alleviate these "harms" to a substantial and material degree. Because of the posture of this case – an appeal from a decision of a Board of Adjustment, that issue is not fully developed below and thus is not presented in this Petition. The Court should be aware that challenges to the evidentiary sufficiencies of the adult use "studies" are pending and will ultimately reach the Court.

a genre, are reputed to cause such effects. Specifically, the Court stated:

> "Adult businesses cannot exclude themselves from legitimate zoning regulation by providing expert testimony that they do not currently produce negative secondary effects." Appendix, p. A-11.

This analysis is entirely without support in the law.[3] In *United States v. Carolene Products*, 304 U.S. 144 (1938), this Court held:

> "... The constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.*, at 153.

In the instant case, *Thee DollHouse* has conclusively, and without rebuttal, shown that the particular facts that underlie this Court's decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) have **never existed**, at least as applied to *Thee DollHouse*. The Supreme Court of South Carolina says that it does not matter that those effects are absent or no longer exist. The South Carolina Court boldly concludes that adult cabarets are reputed to cause secondary effects, and it is immaterial whether *Thee DollHouse* does or does not cause secondary effects.

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[3] Or in common sense. The common sense result of this analysis would be a wholesale approval of police power actions such as racial profiling, and numerous abuses of power because of historical incidents or prejudices.

However, the principle of *Carolene Products* was at the heart of a First Amendment decision in *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3d Cir. 1986), where the Court held:

> "The courts must give great deference [4] to the legislative assumptions of fact underlying the statute or ordinance at issue. However, even when a fundamental interest is not at issue, the legislative judgment is not accorded the *per se* validity that the district court applied here, and legislative findings unsupported by the evidence may be overturned. *See, e.g. City of Clerburne v. Clerburne Living Center*, ___ U.S. ___, 105 S.Ct. 3249, 3260, 3262, ... It follows that **when, as here, fundamental free speech interests are patently burdened, the district court not only is free, but indeed is required to overturn regulations that are premised on legislative assump-tions contradicted by facts in the record**." *Id.* [Emphasis Added].

*Edison Township* filed a Petition for Writ of Certiorari to this Court, which Petition was denied **after** this Court decided *Renton*, 479 U.S. 1103 (1987). It is thus reasonable to infer that the Court did not intend its *Renton* decision to

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[4] *Edison Township* was decided after *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.* , 478 U.S. 328 (1986) and before *44 Liquourmart, Inc., v. Rhode Island*, 517 U.S. 484 (1996) , and thus for this proposition, at least implicitly, relied on law which, in the First Amendment context, has been overruled.

overturn decades of jurisprudence requiring an "*ad hoc* factual inquiry" into zoning regulations. [5]

In no place other than land use planning and zoning are the facts of a particular controversy more important to judicial determinations. Since this Court first approved the concept of zoning of real property in *Village of Euclid, Ohio v. Ambler Realty*, 272 U.S. 365 (1926), there is an unbroken line of cases requiring an *ad hoc* factual inquiry in order to validate the Constitutionality of Zoning Regulations, often in the context of whether the Zoning Regulations amount to an unconstitutional taking. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court held:

> "... Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the circumstances (in that) case.' *Id.* at 124.

Clearly, this Court has recognized the importance and fundamental fairness of evaluating the facts of any given case, by providing instructions to the lower courts as to how the inquiry should be conducted:

> "In engaging in these essentially ad hoc factual inquiries ..." [Citations omitted] *Id.*

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[5] *Renton* should not be considered an exception to this jurisprudence because, as the Court noted in *Renton* (at page 44), that City did not, at the time it adopted its adult use zoning regulations, have any existing Adult Uses whose secondary effects, positive, neutral or adverse, could have been experienced.

Other cases reaching the same conclusion include: *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); and *Pennell v. City of San Jose*, 485 U.S. 1 (1988). which held:

> "... Given the 'essentially ad hoc factual inquir(y)' involved in the takings analysis, *Kaiser Aetna v. United States*, 444 U.S. 164, 175, ... (1979), we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.' *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-295, ... (1981). *Id.* at 10.

In *Nectow v. City of Cambridge*, 277 U.S. 183, 188, (1928) the Court noted that the determination of the issue followed "a hearing and an inspection of the entire area affected," by the master, further proof of the long-standing judicial recognition of identification of the need for an *ad hoc* factual inquiry.

Thus, even outside of the First Amendment context, a Court's examination of zoning regulations must consider whether such regulations are arbitrary and capricious, either on their face, or as applied to various real and business properties. Indeed, it works as a denial of substantial justice, and of substantive due process, if there is no need for an *ad hoc* factual inquiry, since the results of that inquiry can be ignored based on "facts" allegedly "established" 20 years earlier. This is exactly what the Supreme Court of South Carolina did in improperly relying on *Young* and *Renton* for the proposition

that Adult Uses, as a class, cause unique adverse secondary effects.

In *Euclid*, a zoning case dealing with land uses not subject to First Amendment protection, the Court again underscored to the need for an *ad hoc* inquiry, holding:

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

Because, consistently, the South Carolina Courts found that *Thee DollHouse* did not cause any "adverse secondary effects", (and the Board ,implicitly reached the same conclusion as shown by the complete absence of any evidence or findings to the contrary), there is no question that the adult use zoning regulation at issue is "arbitrary and unreasonable," at least as applied to *Thee DollHouse*. The Supreme Court of South Carolina had a duty under the Constitution of the United States to review **and apply** the facts. It failed in that duty.

In a very recent decision, this Court continued to adhere, in a zoning context, to the principle of an *ad hoc* factual inquiry in *City of Monterey, v. Del Monte Dunes at Monterey, Ltd.*, ___ U.S. ___ 119 S.Ct. 1624 (1999).

"Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that 'there must be an exercise of eminent domain and compensation to sustain the act ... depends upon the particular facts.' *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 413 (1922); accord *Keystone Bituminous Coal, supra,* at 473-474. Consistent with this understanding, we have described determinations of liability in regulatory takings cases as '"essentially ad hoc, factual inquiries,"' *Lucas, supra,* at 1015 (quoting *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104, 124 (1978)), requiring 'complex factual assessments of the purposes and economic effects of government actions,' *Yee,* 503 U. S., at 523. *Id.*

Between *Carolene Products* (1938) and *Del Monte Dunes*, (1999), this Court, time and again, has established the rule of law that the facts of a particular application can rebut the legislative presumption underlying legislation:

"In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one. *United States v. Carolene Products Co.*, ... 154 (1938)". *New York State Club Assn. v. New York City*, 487 U.S. 1 (1988).

"Even legislatures, however, are subject to some judicial review of the rationality of their actions. See, e.g., *United States v. Carolene*

*Products Co., ... United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973)." *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991).

If such *ad hoc* factual inquiries are required for simple zoning issues, then, clearly, they must be essential to sustain zoning regulations impacting First Amendment rights:

> "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.' *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (STEVENS, J., concurring in judgment). Accordingly, it is subject to judicial review; and as is most often the case, the standard of review is determined by the nature of the right asserted ly threatened or violated rather than by the power being exercised or the specific limitation imposed. *Thomas v. Collins*, 323 U.S. 516, 529-530 (1945).
>
> "Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S.

365, 395 (1926). But an ordinance may fail even under that limited standard of review. *Moore v. East Cleveland*, supra, at 520 (STEVENS, J., concurring in judgment); *Nectow v. Cambridge*, 277 U.S. 183 (1928).

"Beyond that, as is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. In *Schneider v. State*, 308 U.S. 147 (1939), for example, [452 U.S. 61, 69] the Court recognized its obligation to assess the substantiality of the justification offered for a regulation that significantly impinged on freedom of speech:

"'Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. [452 U.S. 61, 70] And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights.' *Id.*, at 161.8" *Schad v. Borough of Mt. Ephraim*, 452 U.S. 67 (1981).

Regulations in derogation of First Amendment protected freedoms come before a court with a heavy burden of presumed unconstitutionality: *Speiser v. Randall*, 357 U.S. 513 (1958); *Dombrowski v. Pfister*, 380 U.S. 479 (1965);

*Shuttlesworth v. City of Birmingham*, 394 U.S. 147, (1969); *New York Times v. United States*, 403 U.S. 713, (1971).

This Court's governing jurisprudence was summarized as follows in a concurring opinion of Justice Frankfurter's:

> "... The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. *United States v. Carolene Products Co.*, ... note 4, set forth in the margin. A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine; incidentally, it did not have the concurrence of a majority of the Court. It merely rephrased and expanded what was said in *Herndon v. Lowry, supra*, and elsewhere. It certainly did not assert a presumption of invalidity against all legislation touching matters related to liberties protected by the Bill of Rights and the Fourteenth Amendment. It merely stirred inquiry whether as to such matters there may be 'narrower scope for operation of the presumption of constitutionality' and legislation regarding them is therefore 'to be subjected to more exacting judicial scrutiny'." *Kovacs v. Cooper*, 336 U.S. 77 (1949). (Frankfurter concurring.)

Much more recently, the Court has continued to emphasize the need for a factual inquiry into regulations in derogation of First Amendment protected freedoms. Beginning with *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the Court noted that an inquiry must be made into the "manifest purpose" of a regulation, **even if the regulation appears neutral on its face**. Thus, the South Carolina courts had a Constitutional mandate to evaluate whether the "manifest purpose" of the regulations was achieved with respect to *Thee DollHouse*. [6]

The next year, writing for eight Justices, [7] Justice Thomas reiterated a principle dating back to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, (1976) and to *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, (1980) and restated in *Edenfield v. Fane*, 507 U.S. 761 (1993). In particular, Justice Thomas articulated the need for a regulation in derogation of First Amendment freedoms to substantially advance a permissible and articulated need for the regulation:

> "... In *Edenfield*, [*supra*] we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.' *Id.* ... 113 S.Ct. at 1798. That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must dem-

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[6] *Penn Central, supra* (at 124) specifically sets forth the need for this type of "as applied" consideration.

[7] With one concurring opinion.

> onstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' *Id.* ... 113 S.Ct. at 1800. We cautioned that this requirement was critical; otherwise 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.' *Ibid.*" *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

In the instant case, the speech at issue is non-commercial speech, which enjoys even greater protection than commercial speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, (1981).

More recently, in *44 Liquormart, supra,* in a plurality opinion, the Court reiterated the need for a "reasonable fit" between the problem being addressed and the solution adopted. In the instant case, as demonstrated by the findings of the South Carolina Courts, (and by the absence of findings by the Horry County Board of Adjustments), there is no "fit" between the County's Adult Use Zoning Regulations and the purported desire of the County to cure the alleged "adverse secondary effects" of Adult Uses, at least as applied to *Thee DollHouse*. In *44 Liquormart*, the Court held:

> "Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach. ..." *Id.* (Justice Stevens for the Plurality, joined by Kennedy, Thomas and Ginsburg).

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, rather than joining the plurality on the legislative deference issue, enunciated an even more profound acknowledgment that the Courts are not to defer to the legislature in considering the purpose and efficacy of regulations in derogation of the First Amendment:

> "The Court [in *Posadas*] accepted as reasonable the legislature's belief that the regulation would be effective, and concluded that ... the restriction was narrowly tailored to serve Puerto Rico's interest. 478 U.S. at 341-44. The Court accepted without question Puerto Rico's account of the effectiveness and reasonableness of its speech restriction. Respondents ask us to make a similar presumption here to uphold the validity of Rhode Island's law.
>
> "It is true that *Posadas* accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations furthered the government's interest and were no more extensive than necessary to serve that interest. Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny. See, *e.g., Florida Bar v. Went For It*, 515 U.S. ___ 115 S.Ct. at ___; *Rubin v. Coors Brewing Co.*, 514 U.S. ___ [115 S.Ct. [1585] at ___ (1995); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. ___ 114 S.Ct. 2084 ... (1994); *Edenfield v. Fane*, 507 U.S. 761 113 S.Ct. 1792

> ... (1993); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 113 S.Ct. 1505 ... (1993). In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson* [*Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 577 100 S.Ct. 2343, (1980)], by requiring the state to show that the speech restriction directly advances its interest and is narrowly tailored. ..." *Id.* (O'Connor concurring).

Thus, four Justices have rejected the legislative deference found in *Posadas* and four others would "requir[e] the state to show that the speech restriction directly advances its interest and is narrowly tailored" and require the Court to "examine[d] more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny."

Combining the traditional need for an *ad hoc* factual inquiry into whether or not Zoning Regulations are arbitrary and capricious, in derogation of the Fifth and Fourteenth Amendments, with the Supreme Court's recent mandates, 1) for an independent review "requiring the state to show that the speech restriction directly advances its interest and is narrowly tailored," and, 2) requiring the Court "to examine[d] more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim

that the speech restriction satisfies First Amendment scrutiny'" [8] clearly mandates that the South Carolina Courts should have applied the actual absence of adverse secondary effects associated with *Thee DollHouse*, rather than approving the denial of the variance because, 23 and 21[9] years ago, some adult cabarets in Detroit and Seattle may have been problematic. In the words of *Carolene Products*, "those facts have ceased to exist," and, indeed, never existed at least with respect to *Thee DollHouse* in Horry County.

After this Court so often emphasized the need for a factual inquiry to ensure that zoning regulations are not arbitrary and unreasonable, to permit a state court to ignore undisputed facts in the record clearly showing the absence of the advancement of **any** governmental interest, fails to pass muster even under the less onerous test of whether zoning regulations are constitutional. When the heavy burden carried by the state in the regulation of First Amendment protected speech is considered, it is clear that Horry County has failed to carry its burden to show that the facts warrant the closure of *Thee DollHouse*.

To allow the Supreme Court of South Carolina to ignore the judicial principles enunciated by this Court as the appropriate basis to evaluate legislation restricting fundamental rights, poses a dire threat to the protections of such fundamental freedoms and is clearly an issue of great public importance.

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[8] *44 Liquourmart, supra.*

[9] The year in which *Northend Cinema Inc. v. Seattle*, 585 P.2d 1153 (WA. 1978) was decided. *Northend* was the case underlying the finding of adverse secondary effects in *Renton*.

## II. RETROACTIVE ADULT USE ZONING IS CONSTITUTIONALLY IMPERMISSIBLE

The Horry County adult use zoning regulations purport to apply retroactively, making First Amendment protected speech cease, even though it was in a lawful location when it began.

In *Young, supra*, the Court at least implied that it would disapprove retroactive adult use zoning regulations:

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "**[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones.** There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F. Supp., at 370. *Young, supra* at 72, footnote 35. [Emphasis Added]

When this issue was squarely presented to the Supreme Court of Pennsylvania, such retroactive zoning restrictions were clearly recognized as unconstitutional:

> "The effect of the amortization provision herein is to deprive appellant of the lawful use of its property in that it requires appellant to cease using its property as an adult book store ... Appellee argues that appellant is free to relocate to one of the few sites in the Township ... that complies with the place restrictions of the ordinance, or to change its use to sell some

other commodity, in an attempt to convince this Court that the ordinance has not effectuated a 'taking' of appellant's property without just compensation. The Pennsylvania Constitution, ..., however, protects the right of a property owner to use his or her property in any lawful way that he or she so chooses. If government desires to interfere with the owner's use, where the use is lawful and is not a nuisance nor is it abandoned, it must compensate the owner for the resulting loss. A gradual phasing out of nonconforming uses which occurs when an ordinance only restricts future uses differs in significant measure from an amortization provision which restricts future uses *and* extinguishes a lawful nonconforming use on a timetable which is not of the property owner's choosing.

"...

"Thus, we hold that the amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution, Pa. Const. art. I, § 1. There are important policy considerations which support this determination. If municipalities were free to amortize nonconforming uses out of existence, future economic development could be seriously compromised. As one commentator has noted:

> "'The law of zoning should be designed to protect the reasonable expectations of persons who plan to enter business or make improvements on property. The

possibility that the municipality could by zoning force removal of installations or cessation of business might serve to deter such investors.'

"Note, *Nonconforming Uses: A Rationale and an Approach*, 102 U.Pa.L.Rev. 91, 103 (1953). This commentator also notes that forced destruction will often result in economic waste. *Id.* at 104.

"It is clear that if we were to permit the amortization of nonconforming uses in the Commonwealth, *any* use could be amortized out of existence without just compensation. Although such a zoning option seems reasonable when the use involves some activity that may be distasteful to some members of the public, *no* use would be exempt from the reach of amortization and *any* property owner could lose the use of his or her property without compensation. Even a homeowner could find one day that his or her 'castle' had become a nonconforming use and would be required to vacate the premises within some arbitrary period of time, *without just compensation.* Such a result is repugnant to a basic protection accorded in this Commonwealth to vested property interests.

"Accordingly, we find that the amortization provision, Section 805, of Ordinance No. 243 of the Township of Moon is unconstitutional on its face ... *PA Northwestern Distributors, Inc. v. the Zoning Hearing Board of the Township of Moon*, 584 A.2d 1372 (Pa. 1991).

This Court, in addition to its *caveat* in *Young, supra*, has spoken several times cautioning against retroactive legislation:

> "Despite the highly deferential approach which we invariably have taken toward state economic regulations, the Court today finds the retroactive aspect of the Alaska distribution scheme violative of the Fourteenth Amendment." *Zobel v. Williams*, 457 U.S. 55 (1982) (Rehnquist, C.J., dissenting).

If the Court is declining to find retroactive regulations applying its "highly deferential approach ... toward state economic regulations," to be Constitutional, such retroactive restrictions must be unconstitutional if applied to adult use zoning regulations, which are subject to at least intermediate scrutiny.

Also in the very deferential context of economic regulation, this time concerning federal legislation, this Court held:

> "Those opinions make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties; and that it may impose retroactive liability to some degree, particularly where it is 'confined to the short and limited periods required by the practicalities of producing national legislation,' *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U.S. 717, 731. The decisions, however, have left open the possibility that **legislation might be unconstitutional if it imposes severe retroactive liability on a**

> **limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience.**
>
> "...
>
> **"Retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions.** *General Motors Corp. v. Romein*, 503 U.S. 181, 191." *Eastern Enterprises v. Apfel, Commissioner of Social Security*, 524 U.S. 498 (1998) [Emphasis Added]

No clearer statements of the unconstitutionality of retroactive regulations could be made. As noted above, in *Young*, the Court left open the question about whether adult use zoning regulations can be applied retroactively. The question is now squarely before the Court, having been left open in *Young*. It should now be resolved and this Court should find that "any regulation which extinguishes a lawful non-conforming use on a timetable which is not of the property owner's choosing is *per se* confiscatory and violative of the Constitution."

## CONCLUSION

Time and again, this Court has stated that the Constitutionality of the application of zoning regulations requires an *ad hoc* factual inquiry. The Horry County Board made that inquiry, and did not, and could, not find that *Thee DollHouse* actually caused any "adverse secondary effects". This finding was affirmed at every level throughout South Carolina.

While Courts may defer to legislative judgment, that deference is not automatic, and it is greatly reduced in the context of regulations adversely affecting First Amendment protected speech. The Supreme Court of South Carolina erred by ignoring the results of the *ad hoc* factual inquiry, and approving a governmental restriction that could be nothing other than content-based. The precedents of this Court demand that this result be reversed and that fundamental freedoms be protected.

Additionally, this Court left open the question of whether adult use zoning regulations could be applied retroactively in *Young*, (and has not since addressed the issue). That question should now be addressed and resolved in favor of the First Amendment and of private property rights.

For the foregoing reasons, certiorari should be granted.

Respectfully Submitted

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September 21, 1999

# APPENDIX

APPENDIX A
OPINION OF THE SUPREME COURT
OF SOUTH CAROLINA
In The Supreme Court

Restaurant Row Associates
and The Afterdeck, Inc., d/b/a
Thee DollHouse,
Petitioners,

v.

Horry County, a Political Subdivision
of the State of South Carolina,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal From Horry County
Charles W. Whetstone, Jr., Circuit Court Judge
Opinion No. 24944

Heard January 5, 1999 Filed May 17, 1999

AFFIRMED AS MODIFIED

Luke Charles Lirot, of Luke Charles Lirot, P.A., of Tampa, Florida; and Willard D. Hanna, of Harris & Hanna, P.A., of Myrtle Beach, for Petitioners.

Emma Ruth Brittain and John P. Henry, of
Thompson Law Firm, of Conway, for Respondent.

TOAL, A.J.: This case is on appeal from the Court of Appeals' decision upholding the denial of Petitioner's zoning variance. We affirm as modified.

## FACTUAL/PROCEDURAL BACKGROUND

Petitioners Restaurant Row Associates and the Afterdeck d/b/a Thee DollHouse ("Thee DollHouse") began its adult entertainment business in Horry County ("the County") in March 1988. On September 30, 1989, the County adopted Ordinance 92-89, establishing adult entertainment zoning regulations.

Ordinance 92-89, now codified in the Horry County Zoning Code as section 526, granted a six-year amortization period to businesses existing at the time of the ordinance's enactment that were in violation of the ordinance so that they could recoup their investments and seek other locations should the business desire to continue as an adult use.

The zoning plan prohibits the location of an adult entertainment establishment within 500 feet of a residential district. Thee DollHouse is a nonconforming use under the ordinance because it is located 350 feet from a residential district. Almost all of this 350 feet consists of the Atlantic Intracoastal Waterway that separates Thee DollHouse from the residential district. This residential district is comprised of a golf course and currently contains no residential development.

In early 1994, the Horry County Zoning Administrator wrote to Thee DollHouse, advising it that it was an "adult use" as defined by the County's Adult Use Zoning Regulations, and that its nonconforming use of the property would have to cease on or before January 1, 1995. Thee DollHouse responded by filing three separate petitions with the Horry County Board of Adjustments and Zoning Appeals ("the Board"). The first petition challenged the definition of "Adult Cabaret" as used in the ordinance. The second petition alleged that Ordinance 26-90, an ordinance passed after 92-89, effectively

grandfathered in Thee DollHouse's adult use. The third petition requested a variance from the setback and amortization provisions of 92-89.

During the Board meeting, the Zoning Administrator made no recommendation to approve or deny the variance application. A paid consultant testified extensively for Thee DollHouse. The consultant offered testimony, including a written report, supporting Thee DollHouse's claim that it met the variance criteria. The Board also heard comments from several members of the public.

After hearing all the evidence, the Board denied Thee DollHouse's request for a variance as well as its other two petitions. Thee DollHouse then appealed the Board's decisions to the circuit court. The circuit court upheld the Board's determination that Horry County Ordinance 26-90 did not grandfather in adult uses, but nevertheless held that the denial of Thee DollHouse's variance request was "arbitrary and clearly erroneous in light of the lack of any residence on the, golf course and the natural barrier created by the Intracoastal Waterway."

The Court of Appeals found the circuit court erred in reversing the Board's denial of the variance. *Restaurant Row Associates v. Horry County*, 327 S.C. 383, 390 489 S.E.2d 641, 645 (Ct. App. 1997). The Court of Appeals held the Board correctly found Thee DollHouse failed to prove the element of unnecessary hardship. Having determined Thee DollHouse failed to meet one of the four necessary elements of a variance, the Court of Appeals did not discuss the remaining three elements. The Court of Appeals also disagreed with Thee DollHouse's argument that the circuit court erred in concluding that County Ordinance 26-90, which amended certain subsections of § 500 of the County's zoning ordinance, repealed the amortization period established in § 526.2J of Ordinance

92-89, and therefore grandfathered in all nonconforming adult entertainment uses. This Court granted certiorari to consider the following issue:

> Did the Court of Appeals err in reversing the circuit court and thereby upholding the Zoning Board's determination that Thee DollHouse failed to meet the standards for receiving a variance?

LAW/ANALYSIS

Thee DollHouse argues that the Court of Appeals erred by failing to find the Board acted arbitrarily and capriciously in denying the variance. We disagree.

When deciding whether to grant a variance, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 752 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939).

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146,152,432 S.E.2d 470,472 (1993). Here, the County specifically adopted the statutory language of S.C. Code Ann. § 6-7-740 (1976 & Supp. 1998) in Section 1204(B) of its zoning ordinance. That section provides:

> The board of appeals ... shall have the following powers: (2) To authorize upon appeal in specific cases a variance from the terms of the ordinance or resolution as will not be contrary

to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance or resolution will, in an individual case, result in unnecessary hardship, so that the spirit of the ordinance or resolution shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that:

(a) There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, or topography, and

(b) The application of the ordinance or resolution of this particular piece of property would create an unnecessary hardship, and

(c) Such conditions are peculiar to the particular piece of property involved, and

(d) Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution or the comprehensive plan, provided, however, that no variance may be granted for a use of land or building or structure that is

> prohibited in a given district by ordinance or resolution.

In order to grant a variance, the Board must make the factual determination that each of the four elements above favor granting the variance. See *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992). Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 752 (1953). A strong presumption exists in favor of the validity and application of zoning ordinances. *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). In the context of zoning, a decision of a reviewing body, in this case the Horry County Board of Adjustments and Zoning Appeals, will not be disturbed if there is evidence in the record to support its decision. *Id.*

A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Peterson*, 327 S.C. at 235, 489 S.E.2d at 632. However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. See *id; Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d 639 (1991); *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 752 (1953); *Gurganious v. City of Beaufort*, 317 S.C. 481,454 S.E.2d 912 (Ct. App.1995).

This Court has summarized its standard of review in zoning appeals as follows:

> It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not

> feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

*Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952).

As the variance applicant in this case, Thee DollHouse bore the burden of proving its entitlement to a variance. *Application of Groves*, 226 S.C. 459, 85 S.E.2d 708 (1955). If Thee DollHouse failed to meet the requirements of each element of the ordinance, then the Board correctly denied the variance.

Thee DollHouse argues that the Court of Appeals applied an incorrect standard for determining the unnecessary hardship element of the zoning ordinance. We agree, but nonetheless conclude that Thee DollHouse has failed to prove unnecessary hardship. The Court of Appeals held there was no unnecessary hardship because Thee DollHouse failed to present evidence suggesting "there was no feasible conforming use for the land in question." *Restaurant Row Associates v. Horry County*, 327 S.C. 383, 390, 489 S.E.2d 641, 645. Such a standard is akin to a Fifth Amendment regulatory taking analysis. See *Staubes v. City of Folly Beach*, 331 S.C. 192~ 500 S.E.2d 160 (Ct. App. 1998) ("When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

Variance applicants are not required to prove that without the variance there exists no feasible conforming use for the property in question in order to show unnecessary hardship. This Court has upheld the granting of variances where there were feasible conforming uses of the property. See *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977)(holding that zoning board of adjustment abused its discretion in denying landowner's request for variance to permit her to establish child day care center in her brick, residence type house located in residential district); *Stevenson v. Board of Adjustment of City of Charleston*, 230 S.C. 440, 96 S.E.2d 456 (1957)(granting of variance to a church for construction and occupancy of addition for Sunday school was not abuse of discretion); see also *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992)(granting a variance in offsite parking requirements for commercial use of a beachfront lot).

In South Carolina, "The courts have never undertaken to formulate an all-inclusive definition of 'unnecessary hardship'. Although it has been stated that the phrase should be given a reasonable construction, it is recognized that it does not lend itself to precise definitions automatically resolving every case." *Stevenson v. Board of Adjustment of City of Charleston*, 230 S.C. 440, 448, 96 S.E.2d 456,460 (1957); *Application of Groves*, 226 S.C. 459,463, 85 S.E.2d 708, 709-10, (1955); *Hodge v. Pollock*, 223 S.C. 342, 348, 75 S.E.2d 752, 754 (1953).

These cases support Thee DollHouse's position that the unnecessary hardship standard is not the same, or as demanding as, a takings analysis.

Although there is no set definition, this Court has established guidelines for determining "unnecessary hardship." First, a claim of unnecessary hardship cannot be based upon

conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him. *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965). Thee DollHouse was in operation before the enactment of the County's adult uses ordinance so this situation is not before the Court. Second, "before a variance can be allowed on the ground of 'unnecessary hardship", there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation." *Application of Groves*, 226 S.C. 459,463, 85 S.E.2d 708, 710 (1955). S.C. Code Ann. § 6-7-740(2)(c) addresses this precedent by requiring that variance applicants show "Such conditions are peculiar to the particular piece of property involved." Lastly, financial hardship does not automatically constitute unnecessary hardship. *Application of Groves*, 226 S.C. at 464, 85 S.E.2d at 710. ("assuming that they will suffer substantially in a financial way ... that alone is not sufficient [to grant a variance].").

Thee DollHouse's claims of business disruption, loss of goodwill, relocation costs, and contractual obligations to the existing location all fall under the scope of its financial hardship. However, these claims alone do not automatically constitute unnecessary hardship, and in this case the Board concluded that they did not. It is important to remember that Thee DollHouse can continue in its existing location, the only restriction is that it cannot operate as an adult use without a variance. This situation is very different from the one found in *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 438 S.E.2d 273 (Ct. App. 1993), where the landowner was entitled to a variance since the land was zoned residential and, without the variance, the landowner had no other possible use for the property.

Thee DollHouse argues that if it must relocate there will be at least a temporary loss of First Amendment rights, in addition to financial hardship, and this will constitute unnecessary hardship. Thee DollHouse argues that any loss of First Amendment rights would be unnecessary hardship because its business does not produce the secondary effects that allow the regulation of adult business under the First Amendment. We disagree.

Thee DollHouse argues that denying the variance was an unconstitutional application of the ordinance. Initially, the ordinance itself is constitutional under the decisions of the United States Supreme Court in *Young . American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440) 49 L.Ed.2d 310 (1976), *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and this Court's opinion in *Centaur, Inc. v. Richland County*, 301 S.C. 374,392 S.E.2d 165 (1990). Like the ordinances in *Young, Renton*, and *Centaur*, the County's ordinance is not aimed at the content of the speech, but rather at the secondary effects of such businesses on the surrounding community. [1] Local governments have a substantial interest in protecting their neighborhoods from secondary effects related to the operation of sexually oriented businesses. See *Young, Renton, supra.* "Content-neutral" ordinances, such as the County's, designed to regulate the secondary effects of adult businesses, are therefore properly examined and analyzed as "time, place, and manner" regulations.

The County's zoning ordinance is a proper time, place, and manner restriction because it does not unreasonably limit "alternative avenues of communication." See *Renton*, 475 U.S. at 45, 106 S.Ct. at 928,89 L.Ed.2d at 37; *Condor, Inc. v. City off North Charleston*, 328 S.C. at 177 n.3, 493 S.E.2d at 345 n.3. On appeal, Thee DollHouse does not contest that there are

areas of the County where the zoning scheme would allow it to operate as an adult business. With the County having met the *Renton* criteria, the burden of proof rests upon Thee DollHouse to prove the ordinance is unconstitutional as applied to it.

Even though the County's zoning ordinance is constitutionally valid, Thee DollHouse argues that the Board applied it unconstitutionally by denying the variance. Thee DollHouse argues that it provided unrebutted testimony to the Board that it did not produce any negative secondary effects. Thee Doll-House's position is that the Board cannot deny a variance if there was no proof introduced to the Board that Thee DollHouse created any negative effects. We disagree.

*Renton* recognized that local governments need not wait for the secondary effects of adult businesses to actually manifest themselves before implementing zoning restrictions. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456) 115 L.Ed.2d 504 (1991), Justice Souter's concurring opinion recognized that local governments did not have to repeatedly litigate the issue of whether adult businesses create any secondary effects or not. Barnes, 501 U.S. at 583 584, 111 S.Ct. at 2470 ("I do not believe that a State is required affirmatively to undertake to litigate [the secondary effects] issue in every case."). Adult businesses cannot exclude themselves from legitimate zoning regulation by providing expert testimony that they do not currently produce negative secondary effects. Local governments have the power to zone the location of adult businesses without any individualized showing the businesses produce negative secondary effects. [2] The purpose of zoning "is to enable municipalities and counties acting individually or in concert to preserve and enhance their present advantages, to overcome their present handicaps, and *to prevent or minimize such future problems as may be*

*foreseen.*" S.C. Code Ann. § 6-7-10 (Supp. 1998)(emphasis added).

Thee DollHouse also argues that the natural barrier of the Atlantic Intracoastal Waterway prevents even the possibility of negative secondary effects from arising in the future. This Court requires distance measurements of this nature be done "as the crow flies" and not based on the actual terrain that must be crossed. See *Brown v. State*, No. 24861 (S.C. Sup. Ct. filed Nov. 30, 1998)(Shearouse Adv. Sh. No. 38, at 18) ("Courts addressing the issue have uniformly held proximity is measured in a straight line, or 'as the crow flies").

Thee DollHouse cites no cases to this Court in support of its "natural barrier" proposition. [3] revealed that there is a bridge being constructed across the Atlantic Intracoastal Waterway very near Thee DollHouse. There is also a nearby tram that ferries persons across the Intracoastal Waterway. What this testimony shows is that even though there may be a natural barrier now, there may be a bridge in the future. As discussed above, zoning is not only concerned about present conditions, but focuses on the future as well.

The County's ordinance as applied to Thee DollHouse is constitutional. Other than the claim of a temporary loss of First Amendment rights during relocation and the financial hardship associated with such a move, Thee DollHouse did not produce for the Board evidence that would demand a finding of unnecessary hardship. Having failed to meet this required element of the variance criteria, the Board correctly denied Thee DollHouse's petition.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

FINNEY, C.J., MOORE, WALLER and BURNETT, JJ., concur.

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[1] The ordinance provides:

> WHEREAS, by enacting Ordinance Number 92-89, the Horry County Council intended to prevent the recognized ill effects of allowing adult entertainment establishments too close to residential areas; and WHEREAS, residential use existing in zones other than the ones specifically delineated in Section 526.2(C)l as residential are incompatible with and suffer a serious risk of harm by the location of an adult entertainment establishment near them, for the reasons outlined in the studies referenced in Ordinance Number 92-89, which studies are incorporated herein by reference as if set forth herein verbatim.
>
> Horry County Ordinance Number 29-92

[2] We note that the secondary effects doctrine from Renton distinguishes the current case from our decision in Bannum, Inc. v. City of Columbia, ___ S.C. ___, ___ S.E.2d___ (1999). In Bannum, this Court noted that the zoning board of appeals either "discounted or disregarded every single bit of evidence" put up by a special exception applicant. In adult use zoning cases, a reviewing body must take the expert testimony of the applicant into consideration, but the zoning board of appeals still has the authority to deny the variance if its zoning ordinance is constitutionally proper. In the current case, the County was not required to have testimony confirming that Thee DollHouse produced negative secondary effects in order to deny the variance.

3 *Vicary v. City of Corona*, 935 F.Supp. 1083 (C.D. Cal 1996), is the only case found in support of such a "natural barrier" theory. That case has since been overturned by the Ninth Circuit Court of Appeals. *See Vicary v. City of Corona*, 119 F.3d 8, 1997 W.L. 406768 (9th Cir. 1997)(unpublished decision).

APPENDIX B

OPINION OF THE OF SOUTH CAROLINA
COURT OF APPEALS

Restaurant Row Associates and
The Afterdeck, Inc., d/b/a Thee DollHouse,
Respondent/ Appellant,

v.

Horry County, A
Political Subdivision of
the State of South Carolina,
Appellant/Respondent.

Opinion No. 2673
[327 S.C. 383, 489 S.E.2d 641 S.C. App. 1997]

COURT OF APPEALS OF SOUTH CAROLINA

May 8, 1997, Heard
June 9, 1997, Filed

SUBSEQUENT HISTORY:
Rehearing Denied September 4, 1997.

PRIOR HISTORY:
Appeal From Horry County. Charles William Whetstone, Jr., Circuit Court Judge.

DISPOSITION:
AFFIRMED IN PART AND REVERSED IN PART.

COUNSEL:

John P. Henry and Emma Ruth Brittain, both of The Thompson Law Firm, of Conway, for appellant/respondent.

William D. Hanna, Jr., of Harris & Hanna, of Surfside Beach; and Luke Charles Lirot, of Lirot & Dolan, of Tampa, Florida, for respondent/appellant.

JUDGES:

HEARN, STILWELL, and HOWARD, JJ., concur.

OPINION:

*PER CURIAM*: Restaurant Row Associates and The Afterdeck, Inc., d/b/a Thee DollHouse ("Thee DollHouse"). an adult entertainment establishment located in Horry County, brought this action on November 16, 1994, appealing the denial of its request for a variance from the Horry County Adult Entertainment Zoning Ordinance Ordinance 92-89, by* the Horry County Board of Adjustments and Zoning Appeals ("the Board"). The circuit court reversed the Board on the ground that its decision was arbitrary and capricious. Both parties appeal from the circuit court's order. We affirm in part and reverse in part.

FACTS

Thee DollHouse commenced its business as an adult entertainment establishment in the area near the city of Myrtle Beach known as "the Grand Strand" in March 1988. Thee DollHouse is a business featuring entertainment in the form of recorded music and exotic dance performances by female dancers who are sometimes topless. The business also serves alcoholic beverages and offers a light dinner menu.

On September 30, 1989, a year and a half after Thee Doll House commenced business, Horry County adopted

Ordinance 92-89, which established adult entertainment zoning regulations. Under Ordinance 92-89, now codified in the Horry County Zoning Code as Section 526, businesses existing at the time of the ordinance's enactment that were in violation of the ordinance were granted a six-year amortization period in which to recoup their investments and seek other locations should they desire to continue as an adult use.

Thee DollHouse is a nonconforming use under the ordinance because it is located 350 feet from a residential district and therefore violates the requirement prohibiting the location of an adult entertainment establishment within 500 feet of a residential district. The residential district in question is occupied by a golf course and contains no residences. The business is separated from this zoning district by the Atlantic Intracoastal Waterway.

On January 6, 1994, the Horry County Zoning Administrator wrote to Thee DollHouse, advising it that it was an "adult use" as defined by the County's Adult Use Zoning Regulations, and that its nonconforming use of the property would have to cease on or before September 30, 1995. Thee DollHouse responded by filing three separate petitions with the Board. The first challenged the strict definition of "Adult Cabaret" as used in the ordinance. The second alleged that Ordinance 26-90, an ordinance passed after 92-89, effectively grandfathered in Thee DollHouse's adult use. The third petition requested a variance from the setback and amortization provisions of 92-89 based in part on the fact that the only residential property that rendered Thee DollHouse "nonconforming" was a golf course located at least 350 feet across the Atlantic Intracoastal Waterway.

The Board heard the petitions on September 12, 1994. In the course of the Board's hearing of Thee DollHouse's petition for the variance, the Board received a staff report

prepared by the Horry County Zoning Administrator. The report stated that Thee DollHouse had to meet the four criteria found in S.C. Code Ann. @ 6-7-740(2) and in Horry County Ordinance 23-87. The Zoning Administrator made no recommendation to approve or deny the variance application.

R. Bruce McLaughlin, AICP, a consultant, testified for Thee DollHouse. He reviewed his credentials for the Board and was qualified as an expert in the field of land use planning. McLaughlin proceeded to offer extensive testimony, including a written report, supporting Thee DollHouse's claim that it met the variance criteria. The Board also heard comments from several members of the public before McLaughlin made some final rebuttal comments.

After hearing all the evidence, the Board denied Thee DollHouse's request for a variance as well as its other two petitions.

Thee DollHouse then appealed to the circuit court, which heard the three consolidated appeals on January 12, 1995.[1] The circuit court held Horry County Ordinance 26-90 did not grandfather in adult uses, but further held that the denial of Thee DollHouse's variance request was "arbitrary and clearly erroneous in light of the lack of any residence on the golf course and the natural barrier created by the Intracoastal Waterway." The court also noted the following facts: (1) the nearest residence is located over 1600 feet away; (2) Thee DollHouse is opposite a four-lane highway and major traffic artery; and (3) Thee DollHouse does not appear to adversely affect the surrounding neighborhood's crime rate, property values, or general quality of life.

---

[1] On January 6, 1995, the circuit court granted Thee DollHouse's motion to stay enforcement until the January 12, 1995, hearing

THE COUNTY'S APPEAL

The County argues the circuit court erred in reversing the Board's denial of the variance, arguing the Board correctly found Thee DollHouse failed to prove an unnecessary hardship. [2] We agree.

A zoning board's findings of fact are final and conclusive on appeal. *Bishop v. Hightower*, 292 S.C. 358, 356 S.E.2d 420 (Ct. App. 1987). Appeal to the circuit court is only for a determination of whether the board's decision is correct as a matter of law. *Id.*; S.C. Code Ann. § 6-7-780 (1976). On appeal from the circuit court, the Zoning Board's decision should not be interfered with "unless it is arbitrary or clearly erroneous." *Bishop*, 292 S.C. at 360, 356 S.E.2d at 421.

The statutory authority of the Board to grant a variance is governed by S.C. Code Ann. § 6-7-740 (1976 & Supp. 1996). which provides as follows:

> The board of appeals . . . shall have the following powers:
>
> * * *
>
> (2) To authorize upon appeal in specific cases a variance from the terms of the ordinance or resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance or resolution will, in an individual case, result in unnecessary hardship, so that the

---

[2] Because we reverse on this ground, we do not address the County's remaining arguments.

> spirit of the ordinance or resolution shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that:
>
> (a) There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, or topography, and
>
> (b) The application of the ordinance or resolution of this particular piece of property would create an unnecessary hardship, and
>
> (c) Such conditions are peculiar to the particular piece of property involved, and
>
> (d) Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution or the comprehensive plan, provided, however, that no variance may be granted for a use of land or building or structure that is prohibited in a given district by ordinance or resolution.

The County specifically adopted this statutory language in Section 1204(B) of its zoning ordinance. Thee DollHouse, as the variance applicant, bore the burden of establishing the existence of each of the four criteria set forth in Section 6-7-740 for a variance to be granted. *Simmons v. Board of Adjustments*, 226 S.C. 459, 85 S.E.2d 708 (1955).

Practical difficulty or unnecessary hardship, to ground a variance, is not mere hardship, inconvenience, interference

with convenience or economic advantage, disappointment in learning that land is not available for business uses, financial or pecuniary hardship or disadvantage, loss of prospective profits, prevent on of an increase of profits, or prohibition of the most profitable use of property . . . . And it is not per se a sufficient reason for a variance that a nonconforming use is more profitable to the landowner, or that his land is better adapted for a forbidden use than for the one which is permitted. McQuillin Mun. Corp., § 25.168 (3rd. ed. 1991) (footnotes omitted); see *Simmons*, 226 S.C. 459, 85 S.E.2d 708 (financial disadvantage in property value and income to single property owner from application of zoning restrictions does not constitute an "unnecessary hardship"); *Pike v. Zoning Board of Appeals*, 31 Conn. App. 270, 624 A.2d 909 (Conn. App. Ct. 1993) (mere decrease in property value or other financial loss will not ordinarily constitute "hardship" sufficient to mandate issuance of a variance; financial impact must be such that zoning board could reasonably find that application of regulations to property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put and where regulations, as applied, bear so little relationship to purposes of zoning that, as to particular premises, regulations have a confiscatory or arbitrary effect); *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (N.C. 1946) (deprivation of better earning by means of nonconforming use does not constitute an "unnecessary hardship").

Here, Thee DollHouse presented no evidence suggesting there was no feasible conforming use for the land in question. [3] The burden of proof in the proceeding before the Board was totally on the applicant, Thee DollHouse.

---

[3] In fact, Thee DollHouse did not introduce any evidence that it would even incur a financial loss if it was forced to clothe its dancers.

Neither the County nor any other person had to prove that there was a feasible conforming use for the land. The Board was therefore correct to find that Thee DollHouse failed to prove an unnecessary hardship and, consequently, the circuit court erred in reversing the Board.

THEE DOLLHOUSE'S APPEAL

In its cross-appeal, Thee DollHouse argues the circuit court erred in concluding that County Ordinance 26-90, which amended certain subsections of § 500 of the County's zoning ordinance, repealed the amortization period established in § 526.2J of Ordinance 92-89, and therefore grandfathered in all nonconforming adult entertainment uses. We disagree.

It is well settled that, when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. *Charleston County Parks and Rec. Comm'n v. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995). An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Id.* The determination of legislative intent is a matter of law. *Id.*

Repeals by implication are not favored by courts and to repeal a statute because of an asserted conflict or repugnancy with another statute, "the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the Court will so construe them." *City of Rock Hill v. SCDHEC*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). "As a general rule, a statute of a specific nature is not to be considered as repealed in whole or in part by a later general statute, unless there is direct reference to the former or the intent of the legislature to repeal it is explicitly implied

therein." *Spartanburg County DSS v. Little*, 309 S.C. 122, 125, 420 S.E.2d 499, 501 (1992).

Section 500, as originally enacted in 1987, provided in pertinent part:

> 500. Nonconforming Buildings or Uses Nonconforming buildings or land uses are declared by this Ordinance to be incompatible with permitted uses in the Districts involved. However, to avoid undue hardship, the lawful use of any buildings or land uses at the time of enactment or amendments of this Ordinance may be continued even though such use does not conform with the provisions of the Ordinance except that the nonconforming building or land use shall not be:
>
> 500.1 Changed to another nonconforming use;
>
> 500.2 Enlarged or altered in excess of an additional twenty (20%) percent of existing floor area, in a way which increases its nonconformity provided that it meets the requirements for the district. Such enlargements may be made one time only.
>
> 500.3 Nothing in this section shall be deemed to prevent the strengthening or restoring to a safe condition any building or part thereof declared to be unsafe by an official charged with protecting the public safety, upon order of such official.

In 1989, the Adult Entertainment Establishment Ordinance 92-89 was adopted and was codified as § 526 of the County Code. Section 526.2J of Ordinance 92-89 provided an

amortization schedule for all nonconforming adult entertainment establishments at the time of the adoption of the ordinance. It specified a six-year amortization schedule running from September 30, 1989, until January 1, 1995.[4]

Section 500 of the original zoning ordinance was then amended by Ordinance 26-90 in 1990, to provide as follows:

> 500. Nonconforming Buildings or Uses
>
> Nonconforming buildings or land uses are declared by this ordinance to be incompatible with permitted uses in the Districts involved. However, to avoid undue hardship, the lawful use of any buildings or land uses at the time of enactment or amendments of this Ordinance may be continued even though such use does

---

[4] Section 526.2J provides as follows:

> Amortization. The right to maintain a legal non-conforming adult entertainment establishment shall terminate in accordance with the following schedule:
>
| Amount of capital Investment * as Date Before the Effective Which Use of this Ordinance [1] Shall Terminate | |
|---|---|
| 1,000 to 5,000 | January 1, 1991 |
| 5,001 to 8,000 | January 1, 1992 |
| 8,001 to 15,000 | January 1, 1993 |
| 15,001 to 22,000 | January 1, 1994 |
| 22,001 or more | January 1, 1995 |

> * NOTE: The term "capital investment," as used above, is defined to mean the initial outlay by the owner or operator of the use to establish the business as of the date of the enactment of the ordinance, exclusive of the fair market value of the structure in which the use is located,

[1] This ordinance is to take effect on September 30, 1989.

not conform with the provisions of the Ordinance except as follows:

500.1 The nonconforming building or land shall not be changed to another nonconforming use.

500.2 ENLARGEMENTS AND ALTERATIONS

A The nonconforming building, if it houses an allowed land use, may be enlarged or altered to any degree provided that the enlargement or alteration meets all setbacks and other requirements of the district.

B Any building or structure, conforming or nonconforming, which houses a nonconforming land use shall not be enlarged or altered in excess of twenty (20%) percent of existing floor area. The twenty (20%) percent expansion can only occur if all applicable district requirements (setbacks, height restrictions, etc.) are met. If not, the twenty (20%) percent expansion shall be prohibited.

After reviewing the ordinances in question, we agree with the Board and the circuit court that the ordinances are capable of a reasonable reconcilement, namely, that Ordinance 26-90 was intended merely to amend subsections 500.1 and 500.2. It would appear that the ordinance's original language was restated in Ordinance 26-90 with the changes made therein simply to provide the context of the language under consideration. We find, therefore, that the circuit court was

correct to hold that the amortization period continued to apply to Thee DollHouse's nonconforming use.

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, STILWELL, and HOWARD, JJ., concur.

APPENDIX C

ORDER DENYING MOTION FOR REHEARING
THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEARDUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

June 23. 1999

Luke Charles Lirot, Esquire
112 East Street, Suite B
Tampa, FL 33602

Willard D. Nanna, Esquire
Harris & Hanna
4615 Oleander Dr.
Suite 202
Myrtle Beach, SC 29577

Re: Restaurant Row v. Horry County

Dear Counsel

The Court has issued the following order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Ernest A. Finnev. Jr. C.J

s/ Jean H. Toal A.J

s/James E. Moore A.J

s/ John H. Waller. Jr. A.J

s/ EC. Burnett. III. AJ

June 23, 1999,"

The remittitur in this matter is today being forwarded to the Clerk of Court of Horry County

Very truly yours,

/S/

CLERK

DES/dmh

APPENDIX D
OPINION OF THE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 94-CP-26-3379

Restaurant Row Associates and
the Afterdeck, Inc. d/b/a
Thee DollHouse,
Plaintiffs,
v.
Horry County, a Political Subdivision
of the State of South Carolina,
Defendant.

ORDER

Appellant Restaurant Row Associates and the Afterdeck, Inc. d/b/a Thee DollHouse ("Thee DollHouse) appeals from a decision of the Horry County Board of Zoning Adjustments and Appeals ("Horry County"). Thee DollHouse seeks a variance from Horry County's zoning ordinances which affect the operation of Thee DollHouse's adult business.

Thee DollHouse opened its doors in March 1988 offering adult entertainment. On September 28, 1989, Horry County enacted ordinance 92-89 requiring a five hundred foot (500') separation between "adult nightclubs" and residentially-zoned districts, and allowing a five (5) year amortization period for termination of non-complying adult businesses. On May 15, 1990, Horry County adopted ordinance 26-90. This ordinance allowed continued lawful use of any buildings or

land which was nonconforming in order "to avoid undue hardship." Finally, on December 12, 1992, Horry County adopted ordinance 50-92 which increased from Five hundred feet (500') to two thousand feet (2000') the required distance between "adult entertainment establishments" and residentially zoned districts. The County attempts to cease operation of Thee DollHouse in its present location.

## I. Horry County Ordinance 92-89 is constitutional.

Reasonable regulations of the time, place and manner of protected speech, where those regulations are necessary to further significant government interests, are permitted by the First Amendment. *Young v. American Mini-Theatres. Inc.*, 427 U.S. 50, 64 (1976); *Centaur. Inc. v. Richland Co.*, _S.C._, 392 S.E.2d 165, 168 (S.C. 1990). As per S.C. Code Ann. §6-7-7 10 (Law. Co-op. 1993), I find Horry County Ordinance 92-89 was made with reasonable consideration of the character of the area and its peculiar suitability for particular uses and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of land and buildings, and encouraging the most appropriate use of land and buildings and structures. Horry County Ordinance 92-89 is constitutional as applied to Thee DollHouse.

## II. Horry County Ordinance 26-90 does not grandfather in adult uses.

The passage of a later ordinance does not repeal an earlier ordinance unless the intention to repeal is either clearly expressed or clearly implied by the enactment of the ordinance, or. unless the two ordinances are so repugnant to each other as to be totally inconsistent when read together. *City of Rock Hill v. SC.D.H.E.C.*, _S.C._, 394 S.E.2d 327, 331 (S.C. 1990).

Horry County would have stated its intention to grandfather in adult entertainment establishments upon the passage of ordinance 26-90 if it had intended that result. The legislative intent of ordinance 26-90 does not lend itself to grandfathering in adult uses.

## III. Variance to Horry County Ordinance 92-89 is granted.

A zoning board's decision should not be disturbed on appeal unless it is "arbitrary and clearly erroneous." *Bishop v. Hightower*. _S.C., 356 S.E.2d 420, 421 (S.C. Ct. App. 1987). A golf course fairway is the nearest residentially-zoned district to Thee DollHouse. This golf course contains no residences and has no plans for constructing residences. Thee DollHouse is less than five hundred feet (500') from the golf course, in violation of ordinance 92-89. However, the Atlantic Intracoastal Waterway forms a natural bather which permanently separates the golf course from Thee DollHouse. The two are not connected by any nearby bridge. The County's denial of Thee DollHouse's variance request was arbitrary and clearly erroneous in light of the lack of any residences on the golf course and the natural barrier created by the Intracoastal Waterway. The nearest residence is located over one thousand six hundred feet (1,600') from Thee DollHouse and is opposite S.C. Highway #17, a four-lane highway and major traffic artery.

Additionally, Thee DollHouse does not appear to adversely affect the surrounding neighborhood and its quality of life. Thee DollHouse is not causing blight, increase in crime or decrease in property values. Actually, neighboring property values have increased. Neither the businesses nor the citizens in the area have registered complaints.

IT IS ORDERED, ADJUDGED AND DECREED as follows: 1) that Horry County Ordinance 92-89 is constitutional, 2) that Horry County Ordinance 26-90 does not grandfather in adult uses, 3) that the appeal on the issue of the variance application is granted and this matter is remanded to the Horry County Board of Adjustments and Zoning Appeals for the entry of an Order consistent with this order; and 4) that the stay previ

APPENDIX E
ORDER OF THE HORRY COUNTY
BOARD OF ADJUSTMENTS AND
ZONING APPEALS

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
No. 94-08-009
In Re:

Restaurant Row Assoc
and Thee DollHouse
Appellant
vs.
Horry County Board of
Adjustments and Zoning Appeals

BEFORE THE HORRY COUNTY BOARD OF ADJUSTMENT AND ZONING APPEALS

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL DECISIONS

This matter came before the Horry County Board of Adjustments and Zoning Appeals (hereinafter "the Board") for hearing on Monday, September 12, 1994, at 7:00 p.m. in the auditorium of the Burrough's School County Office Building. Members of the Board present were Chairman, George Richardson; Vice-Chairman, Gari Storm; Warren Smith; Walden Graham; and, Kamthi Patrick.

The only issue before the Board is whether or not to grant a variance from the provisions of Article V, Section 526.2C(I.) of the Horry County Zoning Ordinance (Sometimes

referred to as the "Adult Entertainment Ordinance") as amended on December 12, 1992. The Board, therefore, only considered evidence bearing upon this issue.

FINDINGS OF FACT

The Appellant authorized Mr. R. Bruce McLaughlin (Agent) and Mr. Bill Hanna (Attorney) to speak on behalf of the applicant. The applicant (Thee DollHouse) and his attorney were present and allowed to present any and all testimony and evidence to the Board that they deemed appropriate. Elizabeth Gilland, Clay Brittian, Jr., and others as opposing parties were present and allowed to present any and all evidence and testimony that they deemed appropriate. No objection was made by either party to the procedures to be used during the hearing. Based on the evidence and testimony presented, the Board makes the following findings of fact:

a. That the property in question is located at 9719 Highway 17 North.

b. That the property in question is on a parcel of land identified by tax map number 155-14-01-002.

c. That the property in question is zoned Highway Commercial (HC).

d. That on September 28, 1989, the Horry County Council adopted Article V, Section 526 (commonly referred to as the "Adult Entertainment Ordinance") of the Horry County Zoning Ordinance.

e. That Article V, Section 526.2C(1), of the Horry County Zoning Ordinance (as originally adopted in 1989) required all adult entertainment establishments to be "500 feet from the following residential zoning districts: R-1, R-2, R-4, R-7 and their corresponding MR classifications; GR, RR, RC and MHP".

f. That Section 526.2C(1) was amended on December 12, 1992, by the Horry County Council to require adult entertainment establishments to be located two thousand (2000') feet from the aforementioned residential zoning districts.

g. That this parcel is presently used as an adult entertainment establishment.

h. That the building in question is located some three hundred fifty (350') feet from a R-7 zone located due west of the property in question.

i. That the R-7 zone is separated from Thee DollHouse by the Atlantic Intra coastal Waterway.

k. That the Zoning Ordinance says adult entertainment establishments are incompatible with residential areas.

l. That this parcel of land may be used for purposes other than adult entertainment.

m. That the intent and purpose of Section 526.2C is to separate adult entertainment uses from residential areas.

n. That an application for a variance was filed with the Horry County Planning Department on August 18, 1994

o. That an advertisement ran in a local newspaper of general circulation on August 26, 1994.

p. That a public hearing was held before the Horry County Board of Adjustments and Zoning Appeals on September 12, 1994.

q. That there is something unusual about the size, shape and topography of the land.

r. That there are no conditions peculiar to this particular piece of property. That most lots along the Intra coastal Waterway in the Restaurant Row section of Horry County are similar to this parcel of land.

s. That this parcel of land may be used for other uses, and therefore the application of this ordinance in this particular case does not create an unnecessary hardship.

t. That the granting of the requested variance would impair the intent and purpose of the Horry County Zoning Ordinance.

CONCLUSIONS OF LAW

1. That Title 6, Chapter 7, Code of Laws of South Carolina, 1976, as amended, authorizes the Board of Adjustments and Zoning Appeals to grant variances from local zoning ordinances only when all four (4) of the following criteria are met:

a. There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography; and,

b. The application of the ordinance on this particular piece of property would create an unnecessary hardship; and,

c. Such conditions are peculiar to the particular piece of property involved; and,

d. Relief, if granted, would not cause substantial detriment to the public good or impair the purpose and intent of the

Ordinance or the comprehensive plan; provided, however, that no variance may be granted for a use of land or building or structure that is prohibited in a given district.

2. That Article XII, Section 12048, of the Horry County Zoning Ordinance only authorizes the Horry County Board of Adjustments and Zoning Appeals to grant variances when the four (4) part criteria as stated above are met.

3. That there is something unusual about the size, shape or topography of the land for this parcel based on its location to the Intracoastal Waterway.

4. That there is nothing peculiar to this piece of property.

5. That the application of this ordinance in this particular case does not result in an unnecessary hardship.

6. That to grant the variance would impair the intent and purpose of the Horry County Zoning Ordinance.

7. That only one (1) of the four (4) part criteria is met.

FINAL DECISION

The variance as requested is denied.

September 20, 1994
/s/ George Richardson, Chairman

## APPENDIX F

## HORRY COUNTY, SOUTH CAROLINA

## ZONING REGULATIONS

### DEFINITION OF "ADULT CABARET"

"Adult Cabaret - An establishment whose principal business purpose is the offering to customers of live entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished or characterized by an emphasis on matter the depicting, describing, or relating to `specified sexual activities' or `specified anatomical areas.' Establishments that do not provide adult entertainment more than twelve (12) times per calendar year shall not be defined as an adult cabaret." [Emphasis Added] [5]

---

[5] *Ibid.*, § 526.3, p. 8.

No. 99-483

IN THE

# Supreme Court of the United States

RESTAURANT ROW ASSOCIATES and
THE AFTERDECK, INC. d/b/a THEE DOLLHOUSE,

*Petitioners,*

*v.*

HORRY COUNTY, a Political Subdivision
of the State of South Carolina,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH CAROLINA

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Should certiorari be denied because Ordinance 92-89 is a proper time, place and manner restriction and Horry County properly relied upon studies of other localities concerning adverse secondary effects in enacting the adult entertainment ordinance?

2. Is amortization of nonconforming adult entertainment uses constitutionally permissible?

3. Should certiorari be denied because Petitioners failed to appeal the Trial Court's finding of constitutionality of the Ordinance as applied to them and failed to appeal the issue of amortization?

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## STATEMENT OF THE CASE

Horry County (hereinafter the "County"), a body politic and corporate of the State of South Carolina, adopted a zoning ordinance in 1987. Petitioners Restaurant Row Associates and the Afterdeck, Inc. d/b/a Thee Dollhouse (hereinafter "Thee DollHouse") commenced its business as an adult entertainment establishment in March, 1988. On September 30, 1989, Horry County adopted Ordinance 92-89, establishing adult entertainment zoning regulations. Under Ordinance 92-89, businesses existing at the time of enactment that were in violation of the Ordinance were granted a six year amortization period in which to recoup their investment and seek other locations should they desire to continue as an adult use.

On January 6, 1994, the Horry County Zoning Administrative wrote Thee DollHouse reminding it that it was a nonconforming use and warning that it must cease all adult entertainment operations at its current location by January 1, 1995. On August 16, 1994, Thee DollHouse filed three variance appeal applications with the Board of Zoning Adjustments and Appeals (hereinafter the "Board") challenging the Zoning Administrator's decision. Application No. 94-08-009 requested a variance from Section 526.2c of the Zoning Ordinance requiring a 500 foot separation between adult entertainment establishments and residentially-zoned areas. This particular application is the one in controversy in the instant litigation.[1]

---

1. Application No. 94-08-007 challenged the County's definition of "adult cabaret" contained in Ordinance No. 92-89 as not applicable to Thee DollHouse. The County at no time, however, applied this definition to Thee DollHouse, but relied upon its

(Cont'd)

The Board made factual findings and concluded as a matter of law that Thee DollHouse did not meet the statutory requirements for a variance and denied the requested relief (A 33-37). The other two applications for relief were also denied.

On November 16, 1994, Thee DollHouse initiated litigation appealing the denial of its request for a variance from Ordinance No. 92-89 by the Board. Petitioners specifically applied for a variance from a provision of the Ordinance that prohibits the location of an adult entertainment establishment within 500 feet of a residential district, because of it's location within 350 feet of a residentially-zoned district. Thee DollHouse asserted numerous causes of action in its complaint relating to the constitutionality, validity, applicability and statutory construction of Ordinance 92-89.

On March 3, 1994, the trial court judge issued an Order finding Ordinance No. 92-89 constitutional as applied to Thee DollHouse (A-30). The trial court overruled the Board's denial of the variance, however, on the grounds that the Board's decision was arbitrary and capricious because the Atlantic Intracoastal Waterway, in the Court's opinion, formed a natural barrier separating the residential district from the Petitioners' place of business and there were currently no residences located within the residentially-zoned areas.

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(Cont'd)
classification as an "adult entertainment establishment," as to which there is no dispute. Application No. 94-08-008 challenged the Zoning Administrator's determination that amendments contained in Ordinance No. 26-90 did not repeal the amortization period established in Ordinance No. 92-89 for nonconforming adult entertainment establishments.

On June 9, 1997, the South Carolina Court Appeals issued a per curium Order upholding the Board's decision on the grounds that Petitioners had failed to prove an unnecessary hardship under South Carolina Code Ann. § 6-7-740 (1976), thereby reversing the lower court's finding that Thee DollHouse was entitled to a variance (A 15-26). Thee DollHouse failed to appeal the circuit court's ruling that Ordinance No. 92-89 is constitutional as applied to it.

Contrary to the assertion in Petitioners' Statement of the Case, the Court of Appeals did not find there are no residential uses "contemplated" for the golf course (Petition, p. 4). The Court of Appeals merely found that the golf course "contains no residences" (A-17). The record before the Court of Appeals included testimony of one of the owners of the adjoining residential area in which he specifically testified that residential development was contemplated in the future.

Petitioners filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on October 3, 1997, which was granted on July 2, 1998. The South Carolina Supreme Court issued its opinion on May 17, 1999, upholding the Board's denial of the variance, finding that Thee DollHouse failed to establish the requisite element of unnecessary hardship required for a variance (A 1-14). The South Carolina Supreme Court also found that the Ordinance was a proper time, place and a manner restriction which did not unreasonably limit alternative avenues of communication. The Court observed that Thee DollHouse does not contest the fact that there are areas within the County Zoning Ordinance which would allow it to operate as an adult entertainment business.

Thee DollHouse petitioned the South Carolina Supreme Court for Rehearing. The petition was denied on June 23, 1999 (A 27-28).

## REASONS FOR DENYING THE WRIT

### I.

### ORDINANCE 92-89 IS A PROPER TIME, PLACE AND MANNER RESTRICTION AND THE COUNTY'S RELIANCE ON STUDIES OF OTHER LOCALITIES AS TO ADVERSE SECONDARY EFFECTS IS CONSISTENT WITH THE ESTABLISHED CASELAW OF THIS COURT.

Ordinance 92-89 is a zoning measure designed to combat the undesirable adverse secondary effects of adult entertainment businesses and, as such, is properly reviewed under the standard applicable to content-neutral time, place and manner regulations. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1985). The South Carolina Supreme Court properly applied this Court's analysis in *Renton* that " 'content-neutral' time, place and manner restrictions are acceptable as long as they are designed to serve a substantial government interest and do not unreasonably limit the alternative avenues of communication." 475 U.S. at 46. The instant Ordinance is similar to that considered by this Court in *Renton* in that it does not ban adult entertainment establishments, but merely provides that adult entertainment establishments not be located within a specified distance of residential zones. Accordingly, the South Carolina Supreme Court properly considered the Ordinance as a form of time, place and manner regulation.

Petitioners argue that certiorari should be granted because the County was obligated to prove specific adverse secondary effects from the operation of Petitioners' business before it could apply zoning Ordinance 92-89 to it. Petitioners do not dispute that their business is properly classified as an "adult entertainment establishment" within the meaning of Ordinance 92-89. Petitioners' assertion that proof of specific adverse secondary effects caused by its business must be shown, however, is without merit and is contrary to the established caselaw of this Court.

Petitioners' contention that the courts below "specifically acknowledged that Thee DollHouse does not cause the 'adverse secondary effects' allegedly associated with sexually oriented Adult Uses such as adult cabarets" is without support as to the appellate court opinions (Petition for Writ of Certiorari, p. 7). There is no such finding by the South Carolina Supreme Court or the Court of Appeals. These courts merely acknowledged that this is Petitioners' position.

The instant proceeding arose as the result of Petitioners' application for a variance from the County's zoning law pursuant to State law, S.C. Code Ann. § 6-7-740 (1976) (A-7a). As such, Petitioners had the burden of proving the requisite elements for a variance as established by South Carolina law. Horry County made no study of adverse secondary effects as a part of Petitioners' variance application nor was it required to do so. This Court has held that adverse secondary effects peculiar to the particular business or property involved are not a requisite showing. *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 49. The existence, or lack thereof, of adverse secondary effects, is not an undisputed issue as Petitioners contend. In fact, at the variance hearing, the Board accepted testimony from a local real estate developer of property within the vicinity of Thee DollHouse who has held a real estate license since 1979. The developer testified without equivocation that the presence of Thee DollHouse adversely impaired property values in the area.

Relying on *Renton* and *Barnes v. Glenn Theater, Inc.*, 501 U.S. 560, 111 S. Ct. 2556, 115 L. Ed. 2d 504 (1991), the South Carolina Supreme Court properly held that adult businesses "cannot exclude themselves from legitimate zoning regulation by providing expert testimony that they do not currently produce negative secondary effects" and that preventing or minimizing future problems was a legitimate basis for Ordinance 92-89. In *Renton*, this Court reversed the Ninth Circuit Court of Appeals' ruling applying the argument Petitioners propound herein that there must be studies specifically relating to the particular problems or needs of the governmental entity. This Court, rejecting the argument of particularized finding, held that "the Court of Appeals imposed on the City an unnecessarily rigid burden of proof." 475 U.S. at 49. Recognizing that Renton relied heavily on the experiences and studies of the City of Seattle pertaining to prevention of secondary effects, this Court held:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater Zoning Ordinance. The First Amendment does not require a city, before enacting such an Ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonable believed to be relevant to the problem that the city addresses.

*Id.* at 931. In *Renton*, this Court recognized that there is a valid and substantial governmental "interest in attempting to preserve the quality of urban life . . . that must be accorded

high respect." *Id.* at 49 (*quoting Young v. American Mini Theatres*, 427 U.S. 50, 71, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976)). Similarly, in his concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991) Justice Souter observed: ". . . I do not believe that a State is required affirmatively to undertake to litigate this issue [adverse secondary effects] repeatedly in every case." *Id.* at 584-585.

Horry County Ordinance 92-89 specifically provides in its preamble that "the County Council is aware of studies done by other cities and counties throughout the United States of the problems which result from the uncontrolled spread of adult nightclubs;" that "the adult nightclubs in Horry County have begun to concentrate together in small areas causing an increase in criminal activity, deterioration of property values, visual blight and a general decline in the quality of life in the tone of commerce in those areas;" and that the Council "has determined that there are certain land uses with which adult nightclubs are incompatible, such as schools, churches, and residential districts." (A 1a-2a). In particular, the County considered studies from cities such as Houston, Phoenix, Indianapolis, Seattle, Austin, Oklahoma, Los Angeles and Richland County, South Carolina, as well as other places. As this Court clearly articulated in *Renton*, the County was not required under the First Amendment, to conduct new studies so long as the studies relied upon were reasonably believed to be relevant to the problem it was addressing. *Renton*, 106 S. Ct. at 931.

The County's adoption and application of Ordinance 92-89 was held by the trial court to be constitutional. In this regard, the trial court specifically found:

**1. Horry County Ordinance No. 92-89 is constitutional.**

> Reasonable regulations of the time, place and manner are protected speech, where those regulations are necessary to further significant government interests, are permitted by the First Amendment. Young v. American Mini Theatres, Inc., 427, U.S. 50, 64 (1976); Centaur, Inc. v. Richland Co., Inc., __ S.C. __, 392 S.E.2d 165, 168 (S.C. Sup. Ct. 1990). As per S.C. Code Ann. §6-7-710 (Law. Co-op. 1993), I find Horry County Ordinance No. 92-89 was made with reasonable consideration of the character of the area and its peculiar suitability for particular uses and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of land and buildings, and encouraging the most appropriate use of land and buildings and structures. Horry County Ordinance No. 92-89 is constitutional as applied to Thee DollHouse.

(A-30).

The trial court's holding of constitutionality was not appealed to the Court of Appeals by Petitioners and therefore was not properly preserved for appellate review, as argued below.

Petitioners' argument as to particularized findings of adverse secondary effects as to its particular business has been rejected by the Fourth Circuit Court of Appeals. *See 23 Washington Street, Inc. v. City of Hagerstown, M.D.*, 972 F.2d 342 (4th Cir. 1992) (City of Hagerstown, Maryland,

not required to conduct its own study of adverse secondary effects but could rely on reasonably relevant studies conducted by other municipalities).

Petitioners rely upon a variety of cases involving regulatory takings, blanket bans on speech and advertising rights, commercial speech regulations, and forms of suppression of protected speech that are inapposite to the instant matter in Section 1 of its Petition. The instant action is governed by *Renton* and *Barnes*, however, and Petitioner has failed to effectively distinguish these cases.

In summary, this Court's ruling in *Renton* is dispositive of the issue herein. The South Carolina Supreme Court properly held that adverse secondary effects may be reasonably presumed by the governmental entity based on studies of localities and particularized findings are not required. Citing State statutory authority, the South Carolina Supreme Court observed that the purpose of zoning is to enable governmental entities to prevent and minimize future foreseeable problems as well as current conditions. Petitioners' argument is not only without basis under this Court's existing caselaw, but would prevent the use of zoning to address future problems if such an individualized requirement is imposed. Because the South Carolina Supreme Court's decision is consistent with the decisions of this Court, there are no compelling reasons for certiorari to be granted and Petitioners' request should be denied.

## II.

## AMORTIZATION OF NONCONFORMING ADULT ENTERTAINMENT USES IS CONSTITUTIONALLY PERMISSIBLE.

Ordinance 92-89's six year amortization period for nonconforming adult entertainment establishments is a valid and constitutionally permissible exercise of the County's police power. Moreover, Petitioners failed to properly preserve this issue for review as further discussed below.

This Court has recognized that general zoning ordinances are a proper exercise of the police power. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). The use of reasonable amortization provisions to eliminate nonconforming uses is recognized as a constitutionally valid exercise of a state's police power. *See State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320 (N.C. 1975) (upholding amortization period of three years for nonconforming uses and citing cases upholding one- two- and three- year time limitations). Similarly, in *Centaur v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (S.C. Sup. Ct. 1990) and *Collins v. City of Spartanburg*, 281 S.C. 212, 314 S.E.2d 332 (Sup. Ct. 1984), the South Carolina Supreme Court specifically acknowledged that zoning ordinances with amortization provisions are lawful exercises of zoning power.[2] Accordingly, Petitioners' reliance on Pennsylvania caselaws and nonzoning cases is misplaced.

---

2. The instant Ordinance was patterned after the Richland County Ordinance upheld against constitutional challenge by the South Carolina Supreme Court in *Centaur v. Richmond County*, 301 S.C. 374, 392 S.E.2d 165 (S.C. Sup. Ct. 1990).

Ordinance 92-89 contains a six year amortization period. Much shorter amortization periods affecting adult entertainment establishments have withstood constitutional challenge in the federal courts. *See Northend Cinema v. City of Seattle*, 90 Wash.2d 709, 585 P.2d at 1160 (three month amortization for adult theatre that permitted nonadult theatre use thereafter upheld); *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d. 821 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980) (six month period before effective date of adult establishment ordinance upheld is sufficient); *23 Washington Street, Inc. v. City of Hagerstown, Md.*, 972 F.2d. 342 (4th Cir. 1992) (city ordinance containing two year amortization provision for nonconforming adult business upheld) (unpublished opinion).

In *23 Washington Street, Inc., supra*, the Fourth Circuit, rejecting the argument that the two existing adult bookstores affected by the ordinance should have been grandfathered, held:

> "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative" [Ward v. Rock Against Racism, 491 U.S. 781, 800]. To the extent either of the rejected alternatives would have permitted the unchanged operation of the existing adult bookstores to continue downtown, it would have severely undercut the purpose of the ordinance to reduce the secondary effects of adult businesses in downtown Hagerstown. Rather than require the

> bookstores to change their operations, Hagerstown merely required them to move, after an adequate two-year period in which to find new locations. . . .Since strict scrutiny is not required for content, neutral time, place or manner restrictions, see Ward, 491 U.S. at 798-99 n.6, we will not second guess Hagerstown's reasonable choice between adequate alternatives.

Petitioners' reliance on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), for its position that the County cannot require a nonconforming adult entertainment establishment to amortize its nonconforming use is misplaced. The context of the Court's statement that the *Young* ordinance "does not affect the operation of existing establishments but only the location of new ones" is made within the context of the Court's observation that "the situation would be quite different if the Ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 72, Footnote 35. In the instant action, there is no proof in the record that Ordinance No. 92-89 has any effect of suppressing or greatly restricting access to lawful speech activities. In fact, as the South Carolina Supreme Court observed, Petitioners acknowledge there are other areas within the County within which they could lawfully operate. Accordingly, the County's use of a six-year amortization period to require Petitioners to cease their nonconforming use is a valid exercise of the County's police power and the request for certiorari on the basis of this issue should be denied.

## III.

## PETITIONERS FAILED TO APPEAL THE TRIAL COURT'S FINDING OF CONSTITUTIONALITY OF ORDINANCE 92-89 AS APPLIED TO THEM AND FAILED TO APPEAL ANY ISSUE AS TO AMORTIZATION.

As set forth above, the trial court specifically found that Horry County Ordinance 92-89 is constitutional as applied to Petitioners (A-30). Petitioners failed to appeal this finding of constitutionality. Because Petitioners failed to appeal the trial court's ruling that Ordinance No. 92-89 was constitutionally applied, its argument that the Ordinance has been unconstitutionally applied has not been properly preserved for review.

Petitioners have not asserted as a basis for relief, before any of the courts below, its position that the amortization of a nonconforming use is unconstitutional. Accordingly, this issue has also not been properly preserved for review.

## CONCLUSION

Based on the above, it is respectfully submitted that the Court, in its discretion, should deny the Petition for Writ of Certiorari because the South Carolina Supreme Court's decision is consistent with the decisions of this Court pertaining to content neutral, time, place and manner regulations that affect adult entertainment establishments and the amortization of such nonconforming uses is constitutionally permissible. Additionally, these arguments have not been properly preserved for review.

For the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — SOUTH CAROLINA ORDINANCE NUMBER 92-89

ORDINANCE NUMBER *92-89*

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY )

ADULT ENTERTAINMENT ORDINANCE

For the County of Horry, regulating the location and operations of businesses featuring live nude or semi-nude entertainment; providing a licensing requirement for those businesses; providing distance separation requirements from those businesses and certain other uses; providing for the amortization of non-conforming uses; providing regulations and restrictions for the external appearance and advertising; and providing for enforcement.

WHEREAS, the County Council of Horry County is authorized pursuant to the Constitution and General Laws of the State of South Carolina, and more specifically Section 4-9-30, et. seq. of the Code of Laws of South Carolina for 1976, as amended, to enact such Ordinances as shall appear necessary and proper for the security, general welfare, and convenience of the County or for preserving health, peace, order and government therein and to protect property located within its boundaries and its citizens; and

WHEREAS, the County Council has become aware of the rapid proliferation of "adult nightclubs" in the County, wherein nude or semi-nude dancing is performed as entertainment; and

*Appendix A*

WHEREAS, there have been adult nightclubs in the County for some time, but not in the same number as recently; and

WHEREAS, the County Council is aware of studies done by other cities and counties throughout the United States of the problems which result from the uncontrolled spread of adult nightclubs, particularly when those businesses are concentrated together; and

WHEREAS, the adult nightclubs in Horry County have begun to concentrate together in small areas, causing an increase in criminal activity, deterioration of property values, visual blight and a general decline in the quality of life and the tone of commerce in those areas; and

WHEREAS, the County Council has determined that there are certain land uses with which adult nightclubs are incompatible, such as schools, churches and residential districts; and

WHEREAS, some adult nightclubs have begun using offensive advertising, blatant sexual language, garish color schemes, and have failed to maintain their properties in a neat, clean, safe, attractive manner, and as a result of which have caused visual blight and deterioration of the commercial areas in the vicinity of such businesses; and

WHEREAS, the signs and exterior portions of sexually oriented commercial enterprises, adult bookstores, adult movie theatres and massage establishments can be detrimental to the mental health of minors viewing such signs and exterior portions; and

*Appendix A*

WHEREAS, the signs and exterior portions of sexually oriented commercial enterprises, adult bookstores, adult movie theatres and massage establishments can be detrimental to the mental health of minors viewing such signs and exterior portions; and

WHEREAS, it is not the intention of the County Council to restrict the right to free expression, but only to enact an ordinance to prevent the unwanted and harmful secondary effects which occur when the adult entertainment establishments proliferate without control, particularly when they concentrate in relatively small areas; and

WHEREAS, the County Council believe it is necessary to eliminate the adverse secondary effects which have already resulted from the concentration of some adult nightclubs in Horry County through amortization, requiring all non-conforming uses to come into conformity within a specified period of time.

WHEREAS, this Ordinance shall amend and supplement to the Horry County Zoning Ordinance; and

WHEREAS, the County Council has a legitimate interest in preserving the quality of life, community aesthetics, property values and adherence to law and order, while respecting the legitimate exercise of free expression,

NOW THEREFORE BE IT ORDAINED in County Council duly assembled as follows:

*Appendix A*

526. *Adult Entertainment Establishments.*

Adult uses shall be allowed as conditional uses in the following zones: Highway Commercial, Limited Industrial, and Heavy Industrial.

526.1 *Classification.*

Adult Entertainment establishments include but are not limited to: cabarets, bookstores, theaters, video stores, peep shows, adult model studios, sexual encounter centers, escort services and motels, as defined herein; and any other establishment which contains activities characterized by the performance, depiction or description of "specified sexual activities", or "specified anatomical areas".

* * *

C. *Location.* Adult entertainment establishments shall not be located closer than:

1. 500 feet from the following residential zoning districts: R-1, R-2, R-4, R-7 and their corresponding MR classifications; GR; RR; RC and MHP.

2. 1,000 feet from any house of worship, day care center, public or private elementary or secondary education school, public park, public library, cemetery, or any motion picture establishment which shows G or PG

rated movies to the general public on a regular basis.

3. 2,000 feet from any other adult use, provided that this shall not apply to any establishment or cabaret that does not provide adult entertainment more than 12 times per calendar year.

4. Measurements of distance separation shall be in a straight line from the closest points of the buildings in which the adult uses are located.

* * *

I. *Uses Declared Non-Conformimg.*

1. Any adult establishment in lawful operation on September 30, 1989, that is in violation of paragraphs B and C above shall be deemed a non-conforming use. If two or more establishments are within 2,000 feet of one another but otherwise in a permissible location, the business which was first established and continually operating at a particular location will be considered a conforming use; the later-established businesses are non-conforming.

2. An adult business lawfully operating as a conforming use is not rendered a non-

conforming use by the subsequent location, of any use listed in Paragraph C-2, within one-thousand (1,000) feet of the adult business. This provision does not apply when an application for a use permit is submitted after a permit has expired or has been revoked. H.

J. *Amortization.* The right to maintain a legal non-conforming adult entertainment establishment shall terminate in accordance with the following schedule:

| Amount of Capital Investment* as of the Effective Date, of this Ordinance[1] | Date Before Which Use Shall Terminate |
|---|---|
| 0 to 5,000 | January 1, 1991 |
| 5,001 to 8,000 | January 1, 1992 |
| 8,001 to 15,000 | January 1, 1993 |
| 15,001 to 22,000 | January 1, 1994 |
| 22,001 or more | January 1, 1995 |

* * * *

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* NOTE: The term "capital investment," as used above, is defined to mean the initial outlay by the owner or operator of the use to establish the business as of the date of the enactment of the ordinance, exclusive of the fair market value of the structure in which the use is located.

1. This ordinance is to take effect on September 30, 1989.

## APPENDIX B — SOUTH CAROLINA CODE ANN. § 6-7-740 (1976)

The board of appeals or board of adjustment shall have the following powers:

* * *

(2) To authorize upon appeal in specific cases a variance from the terms of the ordinance or resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance or resolution will, in an individual case, result in unnecessary hardship, so that the spirit of the ordinance or resolution shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that:

(a) There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, or topography, and

(b) The application of the ordinance or resolution of this particular piece of property would create an unnecessary hardship, and

(c) Such conditions are peculiar to the particular piece of property involved, and

*Appendix B*

(d) Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution or the comprehensive plan, *provided, however*, that no variance may be granted for a use of land or building or structure that is prohibited in a given district by ordinance or resolution.

* * * *